

Insurance Commissioner  
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KEVIN STOCK  
COUNTY CLERK  
**NO: 19-2-12285-0**

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY

BENJAMIN ZIELINSKI,

Plaintiff,

v.

FIRST NATIONAL INSURANCE  
COMPANY OF AMERICA,

Defendant.

NO.

**CLASS ACTION COMPLAINT FOR  
DAMAGES FOR BREACH OF  
CONTRACT**

COMES NOW BENJAMIN ZIELINSKI (hereinafter "Mr. Zielinski" or "Plaintiff") the above-named Plaintiff, and alleges against the above-named Defendant, FIRST NATIONAL INSURANCE COMPANY OF AMERICA (hereinafter "Defendant" or "SAFECO") as the proposed Representative of a Class to be comprised of certain insureds of SAFECO with policies issued in the State of Washington, as follows:

**I. INTRODUCTION & STATEMENT OF FACTS**

1.1 SAFECO has advertised, solicited, and sold private passenger automobile insurance policies providing 1<sup>st</sup> party Underinsured Motorist property damage coverage ("UIM PD") in the State of Washington. This SAFECO coverage provides, consistent with the

1 requirements of RCW 48.22.030, and copying the relevant statutory coverage language from  
 2 RCW 48.22.030(2), payment for  
 3

4 damages which an **insured** is legally entitled to recover from the owner or  
 5 operator of an **underinsured motor vehicle** because of **property damage** caused  
 6 by an accident. (Bolding in original).

7 1.2 On July 26, 2017, Mr. Zielinski's automobile, a 2017 Volkswagen Golf R, was  
 8 damaged when it was hit, while parked, by another vehicle. Plaintiff's vehicle, as shown by the  
 9 repair estimate, required body and/or paint work to the right quarter panel, rear bumper, and right  
 10 rear door. The cost of repair for the damage was approximately \$1,434.09. Mr. Zielinski was  
 11 not present at the time of the collision and the at-fault driver made no effort to contact Mr.  
 12 Zielinski or to accept responsibility for the collision. Mr. Zielinski filed a Vehicle Collision  
 13 Report with law enforcement authorities and thereafter presented a claim to SAFECO to  
 14 compensate him for the damage to his vehicle pursuant to the UIM PD provisions of his insuring  
 15 agreement with SAFECO.  
 16

17 1.3 SAFECO investigated the facts of the claim, determined fault, and any  
 18 comparative liability, and the estimated cost of repairs of Plaintiff's vehicle, recording each in  
 19 SAFECO's claims files. Based upon its investigation, SAFECO elected to repair Mr. Zielinski's  
 20 vehicle, and did so, again based upon its investigation, under the UIM PD provision of the  
 21 policy. This determination by SAFECO entitled Plaintiff to the benefits available under the  
 22 insuring agreement and Washington law for payment of losses caused by uninsured/underinsured  
 23 motorists, and nothing further was required from Plaintiff to obtain these benefits.  
 24

25 1.4 However, while it paid for repairs to Mr. Zielinski's vehicles, those repairs did  
 26 not, nor could they, fully restore Mr. Zielinski's vehicle to its pre-accident condition. When  
 27 certain automobiles—those within the proposed Class—sustain damage to their structural  
 28

1 systems and bodies, they cannot be fully repaired to their pre-accident condition and are, as a  
 2 result, tangibly different than they were pre-accident. This damage which cannot be fully  
 3 repaired causes the vehicles to suffer a loss in value at the time of the accident called  
 4 “diminished value.” Mr. Zielinski’s 2017 Volkswagen Golf R, which required body/paint repair  
 5 work to the right quarter panel, rear bumper cover, and right rear door, is an example of a vehicle  
 6 that could not be fully repaired to its pre-loss condition and therefore suffered diminished value.  
 7

8  
 9 1.5 In Washington State, unlike in most other States, UIM PD coverage is *mandatory*  
 10 coverage, unless it is expressly declined in writing. UIM PD is made available “for the  
 11 protection of persons insured thereunder who are *legally entitled to recover damages* from  
 12 owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom  
 13 vehicles *because of* ... property damage, resulting therefrom.” RCW 48.22.030(2) (emphasis  
 14 added). This statutorily prescribed coverage applies when the at-fault driver (or hit and run at-  
 15 fault driver) does not have liability insurance (or sufficient insurance) to cover the “*applicable*  
 16 *damages* which the covered person is legally entitled to recover.” RCW 48.22.030(1) (emphasis  
 17 added). As with SAFECO’s own policy language, what triggers coverage, (i.e., the words  
 18 “property damage”), means “physical damage to the insured motor vehicle.” RCW  
 19 48.22.030(3). The plain and undisputable language of RCW 48.22.030 shows that it is designed  
 20 to protect Washington insureds from uninsured or underinsured motorists by allowing them to  
 21 collect their “legally entitled damages” from their own insurer under UIM PD.  
 22

23  
 24 1.6 Materially identical UIM language to that in SAFECO’s policy has been found to  
 25 cover not simply the “physical damage” to the vehicle, but also those damages which resulted  
 26 from the vehicle sustaining property damage. (*Kalles v. State Farm Mut. Auto. Ins. Co.*, 7 Wn.  
 27 App.2d 330, 433 P.3d 523 (2019)). Moreover, coverage for diminished value has been held to  
 28

1 be *mandatory* and non-excludable under Washington's UIM statute. *Pacheco v. Oregon Mut.*  
 2 *Ins. Co.*, \_\_ Wn. App.2d. \_\_, 2019 WL 3887405, ¶19 (2019) ("An express policy exclusion for  
 3 coverage for diminished value of the damaged vehicle is therefore contrary to the UIM statutory  
 4 language").  
 5

6 1.7 In Washington, it is long established that the compensatory damages one can  
 7 recover from an at-fault driver in this State includes what the law refers to as "Diminished  
 8 Value." In *Kane v. Nakamoto*, 113 Wash. 476, 481, 194 Pac. 381 (1920), the Washington State  
 9 Supreme Court held that the measure of damages for injury to a car would be the decrease in the  
 10 fair market value thereof. That rule has been reaffirmed more recently in *Pugel v. Monheimer*,  
 11 83 Wn. App. 688, 690-91, 922 P.2d 1377 (1996) ((damages to real property) "'The owner is  
 12 entitled to damages for both the reasonable and necessary repair costs and the diminution in  
 13 value remaining after the repairs.'") and in *Moeller v. Farmers Ins. Co. of Wa.*, 173 Wn.2d 264,  
 14 267 P.3d 998 (2011) (automobile damages). As WPI 30.12 states, the "compensatory damages"  
 15 recoverable under Washington law include "The reasonable value of necessary repairs to any  
 16 property that was damaged plus the difference between the fair cash market value of the property  
 17 immediately before the occurrence and its fair cash market value after it is repaired."  
 18  
 19  
 20

21 1.8 Here, despite the above, and the relevant statutory language (identified by  
 22 SAFECO itself in its insuring clause) the Mr. Zielinski's insuring agreement attempted to  
 23 expressly *excluded* diminished value as follows:

#### 24 **EXCLUSIONS**

25 A. We do not provide Underinsure Motorists Coverage for *property damage*  
 26 sustained by any **insured**:

27 . . .  
 28

1           8.       For **diminution in value** for your **covered auto**.<sup>1</sup> (Bolding in original).

2  
3           1.9       Plaintiff alleges that despite the specific mandates of RCW 48.22.030, RCW  
4 48.22 *et seq.*, (as confirmed in *Pacheco v. Oregon Mut. Ins. Co.*, \_\_ Wn. App.2d. \_\_, 2019 WL  
5 3887405, ¶19 (2019)), SAFECO improperly excluded coverage for “diminution in value.” As  
6 found in *Pacheco*, the legislative mandate of RCW 48.22.030 protects Washington insureds from  
7 uninsured or underinsured motorists by allowing them to collect for the damage to their own  
8 vehicles from their own insurer under UIM PD. As a result, the purported exclusion of  
9 diminished value in SAFECO’s standard form policy reduces the minimum coverage mandated  
10 by statute and is void and unenforceable.

11  
12           1.10     Like all other members of the proposed Class, when Plaintiff presented his  
13 vehicle to SAFECO to have his property loss adjusted and paid, SAFECO, who inspected the  
14 vehicle, did not adjust the loss to include diminished value loss. SAFECO therefore failed to  
15 compensate Mr. Zielinski and the members of the putative Class for their “legally entitled (i.e.,  
16 diminished value) damages” as a result of the exclusion which is not permitted under the  
17 language of RCW 48.22.030 and Washington Case law.  
18  
19

## 20                           **II. THE PARTIES, JURISDICTION, VENUE**

21           2.1       The Defendant, FIRST NATIONAL INSURANCE COMPANY OF AMERICA,  
22 is a foreign insurer which sells insurance and adjusts losses throughout the State of Washington,  
23 and conducts substantial, continuous and ongoing business in Pierce County with Plaintiff and  
24 may other. Venue is therefore proper pursuant to RCW 4.12.025 section (1) and (3) (d) in this  
25 county as the county in which the Defendant transacts substantial and continuous business.  
26

27  
28                           

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<sup>1</sup> The insuring agreement, in its “DEFINITIONS” section at p. 1, provides that “Diminution in Value” means the actual or perceived loss in market or resale value which results from a direct and accidental loss.”

1 SAFECO's operations and principle place of business are located in King County at 1001 Fourth  
2 Ave., Seattle, WA 98154, see <https://www.safeco.com/about/office-locations>. SAFECO conducts  
3 business in Pierce County and all other counties of this State.  
4

5 2.2 Plaintiff is a resident of Pierce County, Washington.

6 2.3 The claims asserted herein exceed the minimum jurisdictional amount of this  
7 Court but are far less than \$75,000 per Class Member.  
8

9 2.4 All members of the proposed Class are insured under policies issued in and for  
10 the State of Washington for vehicles registered in the State of Washington. As a result, nearly  
11 all proposed Class members are Washington residents and citizens. Less than one percent (1%)  
12 of the members of the proposed Class will be citizens of other States, but nonetheless will be  
13 connected to Washington State via their vehicles and insurance policies.  
14

15 2.5 On information and belief, the proposed Class will include approximately 3,723  
16 claims. This number is derived from Defendant's comparative market share in Washington for  
17 first party personal-line property damage coverage, the sizes of prior classes in which insurers  
18 have provided (always slightly over-inclusive) matching the Class Definition in discovery, and  
19 the findings of a federal court on the number of class members meeting the same class  
20 definition.  
21

22 2.6 Additionally, average diminished value loss damages have been calculated in  
23 other actions by applying Plaintiff's approach to damages (a statistical regression analysis of  
24 vehicle sale prices) based upon a sampling of claims. Using the most recent of these average  
25 losses — after accounting for prior overlapping damage which can be removed from the  
26 recoverable damages — there will be approximately \$1,158 per claim in compensatory damage.  
27  
28

1           2.7     These figures determine that the total amount sought in compensatory damages  
2  
3 in this action will be no more than \$4,311,234. Neither prospective injunctive relief, nor treble  
4 damages are sought.

5           2.8     While this case is unlikely to involve a coverage question in light of binding  
6 Washington Case law finding an exclusion for diminished value recoverable under *Moeller III*  
7 (the relief sought in this case) to be void, should SAFECO nevertheless contend that its  
8 exclusion is not void, the issue is a matter of contractual and statutory interpretation which is  
9 easily resolved. The undersigned counsel has been counsel in various cases which addressed  
10 coverage language including *Moeller III*, *Kalles*, and *Pacheco*, and has repeatedly (including  
11 prior to *Kalles* and *Pacheco*) briefed the issues involved. The meaning of the policy and  
12 statutory language at issue in this case (i.e. the coverage issue if one were asserted) is distinct  
13 and separable from any other issues and has been addressed in all prior cases as a distinct  
14 question of law. To the extent SAFECO were, despite the holdings of *Kalles* and *Pacheco*, to  
15 attempt to assert a coverage issue as a defense, it would raise no factual issues and can be  
16 addressed for *at most* \$40,000 in lodestar fees, including any appeal., with loadstar fees likely  
17 being far less given that the issues have already been briefed in prior cases. As such, given that  
18 any recoverable *Olympic Steamship* fees would not exceed \$40,000 in total, and further that  
19 Plaintiff pleads only for the \$200.00 statutory fee award to the prevailing party, the maximum  
20 amount in controversy in this matter will be less than \$4,351,434. Therefore, jurisdiction under  
21 the Class Action Fairness Act of 2005 ("CAFA") does not exist, as the amount in controversy is  
22 far less than \$5,000,000.00.  
23  
24  
25  
26

#### 27           IV. COMMON COURSE OF CONDUCT BY SAFECO

28           4.1     SAFECO solicits and advertises for consumers to purchase UIM coverage for

1 their vehicles from SAFECO.

2  
3 4.2 The policy that SAFECO issued to all members of the proposed Class promised  
4 as follows:

5 damages which an **insured** is legally entitled to recover from the owner or  
6 operator of an **underinsured motor vehicle** because of **property damage** caused  
7 by an accident. (Bolding in original).

8 4.3 Plaintiff elected to make a claim under his UIM policy for his loss due to the at  
9 fault driver being underinsured. The language in the policies falling within the Class has been  
10 authoritatively construed in the *Moeller*, *Kalles* and *Pacheco* decisions as providing diminished  
11 value coverage, and to not allow the exclusion of such coverage. SAFECO neither adjusted  
12 UIM claims to address the damage which results from diminished value, nor paid full and fair  
13 diminished value damages on UIM claims, and such sums remain owing under the policies  
14 SAFECO issued.

## 15 16 V. CLASS ACTION ALLEGATIONS

17 5.1 This action is brought as a class action under Superior Court Civil Rule 23.  
18 SAFECO's conduct has been systematic and continuous and has affected large numbers of  
19 SAFECO policy holders over time in Washington. Plaintiff brings this class action to secure  
20 redress for SAFECO's uniform and common practice of excluding coverage for diminished  
21 value losses so that SAFECO has failed to restore them to their pre-loss condition, including  
22 compensation for value, by failing to compensate Class Members for their losses when their  
23 vehicles have unavoidable tangible differences after repair. SAFECO's conduct has been  
24 uniform throughout the Class Period.

25 5.2 All members of the proposed Class have fully complied with all pertinent policy  
26 provisions to receive payment under their policies from SAFECO. Each member of the  
27  
28



1 proposed Class has presented a claim to SAFECO or its agents to have the loss fully adjusted,  
 2 and SAFECO has failed to adjust their claim to include diminished value, or to pay the loss  
 3 fully. No further performance is required by any member of the proposed Class to secure all  
 4 available coverages and benefits provided by the SAFECO policy.  
 5

6 5.3 Plaintiff seeks certification of the following Class:

7 All SAFECO Insurance Company insureds with Washington policies issued in  
 8 Washington State, where the insureds' vehicle damages were covered under  
 9 Underinsured Motorist coverage, and

10 1. the repair estimates on the vehicle (including any  
 11 supplements) totaled at least \$1,000; and

12 2. the vehicle was no more than six years old (model year  
 13 plus five years) and had less than 90,000 miles on it at the time of  
 14 the accident; and

15 3. the vehicle suffered structural (frame) damage and/or  
 16 deformed sheet metal and/or required body or paint work.

17 Excluded from the Class are (a) claims involving leased vehicles or total losses, and (b)  
 18 the assigned judge, the judge's staff and family.

19 5.4 Membership in the Class is so numerous as to make it impractical to bring all  
 20 Class members before the Court. The exact number of Class members is unknown but can be  
 21 readily determined from the records maintained by SAFECO. Plaintiff believes based upon  
 22 discovery in prior cases that the Class size will be approximately 3,723 claims, based on a  
 23 similar, but slightly smaller, number of SAFECO insureds (some Class members will have more  
 24 than one qualifying accident).

25 5.5 Plaintiff is a typical member of the Class. He purchased a SAFECO automotive  
 26 policy, paid premiums, and made a claim for loss when his insured automobile was damaged in  
 27 an accident. He filed a claim and made his vehicle available to SAFECO for determination and  
 28

1 payment of his loss. SAFECO then failed to adjust the loss to include diminished value, nor to  
2 pay that loss.  
3

4 5.6 As in the *Moeller* and other decisions, there are numerous and substantial  
5 questions of law and fact common to all of the members of the proposed Class which  
6 predominate over any individual issues. Included within the common questions of law and fact  
7 are:  
8

- 9 (a) Whether SAFECO was contractually obligated to provide payment for diminished  
10 value to its UIM insureds;  
11 (b) Whether Plaintiff and the members of the proposed Class had any further obligations  
12 before having their UIM losses adjusted by SAFECO to include diminished value;  
13 (c) Whether SAFECO breached its contracts of insurance with the Class by failing to  
14 pay diminished value in UIM claims;  
15 (d) Whether SAFECO breached its contracts of insurance with the Class by failing to  
16 adjust losses to include diminished value;  
17 (e) The measure of damages for diminished value for the Class and its amount; and  
18 (f) Whether Class members' vehicles were tangibly different after an accident and  
19 repair compared to before the accident, or if only "intangible" and invisible  
20 differences remain after repair.  
21  
22  
23

24 5.7 Plaintiff has no interests adverse to the interests of other members of the  
25 proposed Class, and he will fairly and adequately protect the interests of the Class.

26 5.8 Plaintiff has retained the undersigned counsel, who are experienced and  
27 competent in the prosecution of class actions and complex litigation and have extensive  
28

1 experience with litigation involving diminished value, and who have the resources and  
2 experience necessary to prosecute this case.

3  
4 5.9 A class action is superior to other available methods for the fair and efficient  
5 adjudication of this controversy. Absent a class action, due to the refusal of SAFECO to adjust  
6 and fairly pay the loss, the Class members will continue to suffer damage and SAFECO's  
7 conduct will proceed without effective remedy.

8  
9 5.10 Individual members of the proposed Class have little interest or ability to  
10 prosecute an individual action due to the complexities of the issues involved, the costs of  
11 assembling proof of the amount of diminished value, the time required, and the relatively small,  
12 although significant (likely averaging around \$1,158 per accident once prior overlapping  
13 damage is removed) damages suffered by each member of the proposed Class.

14  
15 5.11 This action will allow the orderly, fair, and expeditious administration of Class  
16 claims; economics of time, effort, and expense will be fostered; and uniformity of decisions will  
17 be ensured. As with prior diminished value cases in this country, collective adjudication will  
18 allow sufficient proof and expertise to be assembled to value fairly and to prove the losses at  
19 issue. It will allow a proper and common adjudication of Class wide methods of determining  
20 the amount of diminished value loss, as compared to the common method used by SAFECO.

21  
22 5.12 This action will present no difficulties which would impede its management by  
23 this Court as a class action, and a class action is the best available means by which Plaintiff and  
24 the members of the proposed Class can seek redress for the harm caused to them by SAFECO.

## 25 **VI. PLAINTIFF'S CAUSE OF ACTION: BREACH OF CONTRACT**

26  
27 6.1 Plaintiff realleges the allegations contained in the previous paragraphs as if fully  
28 set forth herein.

6.4 As a direct and foreseeable consequence of the foregoing, Plaintiff and the members of the Class have been damaged by receiving less (in the form of the difference in the pre-accident market value of the vehicle and its market value as a vehicle repaired to industry standards) than they would have received had SAFECO paid the amounts Plaintiff and members of the Class were entitled to, in an amount to be determined at trial.

7.1 Plaintiff and the members of the proposed Class have been injured as a result of SAFECO's conduct as described above. As a result, Plaintiff and the members of the proposed Class are entitled to and pray for the following relief:

1. Payment of the difference between the insured vehicle's pre-loss market value and its market value as a repaired vehicle after the accident;
2. Costs of suit pursuant to RCW 4.84.015 (\$200);

1 3. Post-judgment interest on the judgment at the rate provided by law from the date of  
2 judgment until paid; and  
3

4 4. For such other relief as is deemed just, equitable and necessary to effectuate the  
5 Court's Orders and Judgment.

6 WHEREFORE, THE FORGOING BEING CONSIDERED, Plaintiff respectfully  
7 requests that the Court certify this case as a Class Action and that judgment be entered for the  
8 Plaintiff and members of the proposed Class against SAFECO for the damages described above,  
9 and for any orders necessary to effectuate this Court's Judgment.  
10

11 DATED this 21<sup>st</sup> day of November, 2019.

12 Law Offices of STEPHEN M. HANSEN, P.S.

13  
14   
15

16 STEPHEN M. HANSEN, WSBA #15642  
Of Attorneys for Plaintiff

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18 (To be admitted *Pro Hac Vice*)  
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24  
25  
26  
27  
28

VERIFICATION

THE UNDERSIGNED verifies under penalty of perjury under the laws of the State of Washington as follows:

That as the above-named Plaintiff, I have read the above and foregoing Complaint, and to the best of my knowledge the allegations contained therein are true and correct.

DATED AT Tacoma, Washington, this 14<sup>th</sup> day of November, 2019

  
BENJAMIN ZIELINSKI